TO: The Chief Justice and the Associate Justices of the Supreme Court of The United States

The respondent, Charles E. Hart, respectfully prays that the petition for writ of certiorari by the the Attorney General of the State of Arizona be denied.

QUESTION PRESENTED

Respondent disagrees with the Question Presented for Review as set forth in the Petition for Writ of Certiorari because the Question is presented therein as a general proposition removed and isolated from the matrix of fact which particularly justified the Order of the District Court upheld by the Court of Appeals for the Ninth Circuit, because by its very generality the Question demands an unnecessary and dangerously broad answer encompassing situations beyond the narrow factual situation presented, and because the Question inaccurately characterizes the Order of the District Court. Respondent submits the following statement of the Question Presented:

When a state prisoner is before a District Court on a petition for writ of habeas corpus and when the transcript of petitioner's trial is missing and the State, before determining that the transcript was no longer available, ignored two orders of the District Court for production of the transcript and thereafter summarily denied a petition for a delayed appeal whereby a record could have been reconstructed, and where the available state court records indicate the petitioner's constitutional rights may have been violated, may the District Court order the petitioner released unless the State grants petitioner a delayed appeal, a hearing to reconstruct the events at trial, or a new trial?

STATEMENT OF THE CASE

Petitioner's Question Presented and Statement of the Case characterize the Order of the District Court to which the State objects as a simple remand to the state courts by the District Court with the suggestion of abrogation of responsibility by the District Court as well as violation of the principles of federalism. Petitioner's Statement of the Case is inadequate in that it does not reveal the complex series of events and delays in respondent's quest for post-conviction relief which led to the District Court's Order only after, as stated in the Court of Appeals opinion, the District Court judge had "abstained from acting, temporized his acts, and stayed their effect"

in making every effort to accommodate the delicate balance between the state and federal courts. ___ F.2d ___ (1972) (Petition for Writ of Certiorari*, Appendix A 15). Thus, the facts as restated hereinbelow will reveal that the order of the District Court, rather than being the threat to federalism suggested by petitioner, was in fact an appropriate and proper exercise of discretion by the District Court in response to a unique fact situation and was fully in accord with the principles set forth in decisions of the Supreme Court of the United States.

Respondent Charles E. Hart (hereafter sometimes referred to as "Hart" was,

*hereafter sometimes referred to as "Petition"

after trial in the Superior Court, Maricopa County, Arizona, found guilty of murder first degree and in May, 1961, was sentenced to life imprisonment. At his trial, Hart, an indigent, was represented by court-appointed counsel.

Beginning in February, 1966, Hart filed successive applications for writs of habeas corpus with the Superior Court, Court of Appeals and Supreme Court of the State of Arizona. Each of these applications was denied summarily without hearing.

In 1967, Hart moved in the Superior Court for an order that he be furnished a transcript of record or reporter's transcript of his trial; at the same time he filed an affidavit stating that he was an indigent. His motion for transcript was

denied by the State.

On November 21, 1968, Hart filed a petition for writ of habeas corpus in the United States District Court, District of Arizona. On December 5, 1968, the District Court appointed counsel to represent Hart. This was the first time that Hart had been represented by counsel in connection with any of his petitions for writs for habeas corpus.

Thereafter, Hart persistently attempted to obtain a transcript of his trial so that the issues raised in his petition for writ could be determined on their merits. His attempts have been met with what the State candidly concedes in its petition has been "a rather incredible series of delays" (Petition 13).

First the State failed for over five months to comply with the District Court's order that it produce the transcript of Hart's trial. This failure caused the District Court to enter a second order dated August 7, 1969 that the State produce the transcript within ninety days or show good cause why it could not be produced or Hart would be released. The State, in a callous show of neglect of the District Court's order, failed to produce a transcript or show good cause why it could not be produced within the ninety-day period. Consequently, the District Court ordered Hart released. Immediately the State awoke to its neglect and requested, the following day, that the order of release be stayed.

As of that date, November 7, 1969, more than eight months after the District Court had ordered production of the transcript, the State had still not taken the minimal steps necessary even to learn that a transcript could not be produced and, in order to prevent Hart's release, was still assuring the Court that a "transcript will be prepared forthwith". In response, the District Court stayed the order of release. Apparently sometime between November 7, 1969 and November 12, 1969, the State finally determined that a transcript was not available and produced the court reporter to testify to that fact at a hearing on November 12, 1969. As noted in the decision of the Court of Appeals, the reporter's testimony illustrated a laxity and lack of

system governing the storage of court reporter's notes. The reporter testified that some reporters' notes in her county were stored at seven different places* (Petition, Appendix A 5-6).

Thereafter, the District Court entered its Order of December 19, 1969 that Hart return to the state courts to seek a delayed appeal or a hearing to reconstruct the events at trial. When the Arizona Supreme Court summarily rejected Hart's request for such relief, the District

* the County Hospital, the basement of the new courthouse building, the boiler room of the old courthouse building, the Adult Probation office storage area, the old jail (two floors thereof), the storage warehouse at Fifth and Jefferson and the court reporters' official storage area (Petition, Appendix A 5-6).

Court entered its Order, which the State now asks this Court to review, that Hart be released in sixty days unless the State grant Hart a delayed appeal, a hearing to reconstruct the evidence, or a retrial.

Hart's petition for writ before the District Court raised the same issues as those presented in his previous writs filed with the three levels of state courts: 1) his conviction was secured by a coerced confession and 2) denial of counsel or ineffective assistance of counsel. Hart has alleged that a statement in the nature of a confession was coerced from him prior to trial and that the statement was improperly admitted into evidence at trial.

The available record, without a transcript, contains only a minute entry

record of the events at trial. The record lends support to Hart's allegations that his constitutional rights were violated with respect to the admission of his confession in that he was not afforded the safeguards established by this Court in Jackson v. Denno, 378 U.S. 368 (1964), but unfortunately the record does not provide enough detail to allow a conclusive determination. It is for this reason, as well as in connection with Hart's allegations regarding lack of assistance of counsel, that the District Court ordered production of the transcript. It is also for this reason that, when a transcript proved unavailable and when the Arizona Supreme Court refused summarily to grant Hart's request for a hearing to reconstruct

the record, the Court entered the Order from which the State has appealed.

It is important to note that the District Court has not refused to grant Hart an evidentiary hearing if such proves necessary; it has merely requested the State, at the least, to provide the District Court with a record of what took place at trial, a transcript apparently being unavailable through the laxity of state procedure and perhaps, as noted by the Court of Appeals, the failure of the State to attempt to comply with the order to produce the transcript for almost eight months (Petition, Appendix A 16).

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE ORDER OF THE DISTRICT COURT AND THE DECISION OF THE COURT OF APPEALS AFFIRMING THE ORDER, WHEN VIEWED IN LIGHT OF THE RELEVANT FACTS, DO NOT PRESENT A FEDERAL QUESTION OF SUBSTANCE.

The Order challenged by the State is not the broad and significant challenge to the principles of federalism suggested by the State's Question Presented for Review. Rather, as explained in respondent's Statement of the Case, it is an order which was issued by the District Court only after an egregious disregard by the State of two Orders by the District Court which disregard may have caused the ultimate unavailability of the transcript of Hart's trial and after the summary denial by the state courts of Hart's motion for

delayed appeal which procedure allows reconstruction of the record. Moreover, in affirming the Order, the Court of Appeals was painstakingly careful to limit its decision to the unique factual situation before it. This Court has frequently recognized that district courts must be allowed latitude in administering habeas corpus petitions to accommodate the unique situations frequently presented. For example, in Townsend v. Sain, 372 U.S. 293 (1963), the Court stated:

> "The federal district judges are more intimately familiar with state criminal justice, and with the trial of fact, than are we, and to their sound discretion must be left in very large part the administration of federal habeas corpus." Supra, at 313.

As held by the Court of Appeals, the District Court was doing no more than prudently, and with commendable restraint, exercising that discretion in the face of unusual and peculiar circumstances. Thus, the petition should be denied because the Order and Decision, rather than being an attack against federalism of "transcendental importance" as suggested by the State, involve merely an appropriate exercise of discretion by the District Court in an unusual and limited factual situation.

2. THE ORDER OF THE DISTRICT COURT AND THE DECISION OF THE COURT OF APPEALS ARE PROPER, CORRECT AND IN ACCORD WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

In the present case, Hart alleged in his petition for writ of habeas corpus

that his conviction was the result of use at trial of a coerced confession and that he was denied assistance or effective assistance of counsel. The minute entry record of the trial reveals that Hart's confession was indeed read to the jury and suggests that the Court considered a motion by Hart's attorney to exclude the confession, but the entries do not reveal the extent of the consideration of the motion or whether the trial judge in fact made the initial finding of voluntariness required by Jackson v. Denno, supra. The minute entries are also entirely inadequate to determine the effectiveness of counsel at trial.

Faced with the incomplete record of Hart's trial, the District Court, in

accordance with Townsend v. Sain, supra, ordered the State to produce a transcript. It was only after the incredible series of delays previously described, caused in large part by the State's disregard of court orders, which the Court of Appeals suggests might even have resulted in the eventual unavailability of the transcript, that the District Court entered the Order requiring the State, at the least, as an alternative to Hart's release, to reconstruct a record of the events at trial. This Order was entered without any suggestion by the District Court that it will refuse to provide Hart an evidentiary hearing in the event such proves necessary.

The Order entered by the District Court is in accord with previous orders

upheld and even authorized by this Court.

In Boles v. Stevenson, 379 U.S. 43 (1964), the Court held that where it could not be ascertained from the record whether the trial judge decided voluntariness under appropriate standards as required by Jackson v. Denno, supra, the case would be remanded to the District Court to allow the State a reasonable time to afford the state prisoner a hearing (on the voluntariness of the confession) or a new trial, failing which he would be entitled to release.

The minute entry records of Hart's trial, as discussed in the Court of Appeals' Opinion, similarly do not reflect whether Jackson v. Denno standards were met, yet the Order entered by the District Court in presenting alternatives of reconstruction

of the record or delayed appeal (with attendant procedures for reconstructing the record) requires even less of the State than the order sanctioned in Boles v. Stevenson.

In Chessman v. Teets, 354 U.S. 156 (1957), this Court remanded a case to a district court with instructions to enter an order similar to the Order here challenged by the State. The Ninth Circuit summarized the applicability of Chessman as follows:

> "There, the reporter at the state court trial had died after transcribing a small portion of the trial and there was great difficulty in reading his notes. The state court undertook a procedure for the creation by others of a purported transcript. The defendant was not represented during that procedure and challenged the accuracy of the purported transcript.

> After exhausting his state remedies, he applied to the federal court for a writ of habeas corpus. The Supreme Court held that the state court procedure in creating the purported transcript lacked the requirements of due process and remanded the case to the District Court with instructions to enter an order as prescribed by the Supreme Court in its opinion. The prescribed order permitted the state courts a reasonable time within which to comply with constitutional requirements in connection with the transcript, and, failing such action, ordered that the petitioner be discharged. 354 U.S. at 166" (Petition, Appendix A 12)

The conditional Order of the District Court is similarly in accord with other federal decisions cited in the Ninth Circuit's Opinion.

The essence of the State's argument, relying primarily on Townsend v. Sain, supra, is that the Order of the District Court would have been proper only after

the District Court had first held an evidentiary hearing and determined that petitioner's constitutional rights had been violated. (Petition 16) The Court of Appeals, in affirming the Order, carefully considered the application of Townsend v. Sain, supra, and correctly concluded that the Order does not conflict with that decision. (Petition, Appendix A 13-14)

The issue before the Court in Townsend v. Sain, supra, was when and whether a district court must hold an evidentiary hearing before it may dismiss a state prisoner's petition for writ of habeas corpus; the issue was not, as here, whether a district court may conditionally require a state to take certain action

prior to an evidentiary hearing by the district court. In Townsend, a district court had dismissed a habeas corpus petition after refusing to grant petitioner a hearing. This Court held that under the circumstances which existed, the petition could not be dismissed without a hearing. This Court further held that a district court must hold a hearing before dismissing a petition:

> "if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." Supra, at 312.

From the available minute entry record of Hart's trial, it is unclear whether Hart was afforded such a hearing and Hart believes that the answer to that question

is all the District Court is seeking to determine by its Order. There has been no indication whatsoever by the District Court that it will not hold an evidentiary hearing if necessary. Thus, the issue is not, as in Townsend, refusal of the District Court to hold an evidentiary hearing requested by a state prisoner. The issue is, rather, whether the District Court may enter a conditional order such as the Order challenged by the State when faced by the facts set forth hereinabove, including the fact that a transcript or reconstructed record is reasonably necessary to determine the issue before the District Court and the fact that the State, for more than eight months, disregarded two court orders requiring production of a

transcript which disregard may have resulted in the unavailability of the transcript. In Townsend v. Sain, supra, this Court specifically noted the area of discretion which must of necessity be left with the district courts in the administration of writs of habeas corpus. Respondent Hart submits that the District Court was acting well within that area of discretion and in addition, as stated by the Court of Appeals, with reserve and careful consideration of the principles of federalism.

It is clear from Townsend v. Sain that a district court may compel production of the state record if necessary to a determination of the issues before the District Court. That is all that the

District Court initially sought to do. It was only after the more than eight months of neglect by the State of federal court orders that the District Court, having determined that Hart had been denied his constitutional rights (Petition, Appendix B 1) finally entered the Order affirmed by the Ninth Circuit.

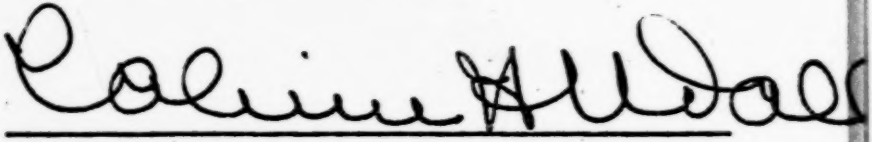
In summary, the writ of certiorari should be denied because the Order approved by the Ninth Circuit was the result of an unusual and limited factual situation which arose within an area of discretion preserved for the district courts as a necessary adjunct to their administration

of petitions for writs of habeas corpus and, thus, does not raise a substantial federal question, and because the conditional Order entered by the District Court, as carefully considered by the Ninth Circuit, is in accord with previous decisions of the Supreme Court of the United States.

CONCLUSION

For these reasons, the writ of certiorari to review the judgment and opinion of the Ninth Circuit should be denied.

Respectfully submitted,



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AFFIDAVIT

STATE OF ARIZONA)
) ss.
County of Maricopa)

CALVIN H. UDALL, being first duly sworn upon oath, deposes and says:

That he served the attorneys for Petitioner in the foregoing case by forwarding two (2) exact copies of Brief in Opposition to Petition for Writ of Certiorari in a sealed envelope, first class postage prepaid, and deposited same in the United States mail addressed to:

GARY K. NELSON, The Attorney General
of the State of Arizona
WILLIAM P. DIXON, Assistant Attorney
General
159 State Capitol Building
Phoenix, Arizona 85007

this 18th day of May, 1972.

Calvin H. Udall

SUBSCRIBED AND SWORN to before me this 18th day of May, 1972.

Darlene R. Haniman
Notary Public

My Commission Expires:
December 18, 1975